Poteck Enterprise Sdn Bhd v Richallenge Corp Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)(NCvC)-151–01 OF 2022
LEE SWEE SENG, LIM CHONG FONG AND ALWI ABDUL WAHAB JJCA
14 MAY 2025

Damages — Assessment — Appeal against — Respondent sued appellant for wrongful termination of subcontract in relation to construction of school — Court of Appeal found in favour of respondent and ordered assessment of damages — High Court judge awarded damages for work done, variations, advance payment, performance bond and loss of profit — Whether damages proven — Whether High Court judge erred in awarding damages which justified appellate intervention — Evidence Act 1950 ss 101 & 102

The appellant was awarded the main contract by the Ministry of Education Malaysia ('the employer') to construct a school in Kuala Marudu, Sabah ('the building works') with a contract value of RM42,750,000. The appellant then subcontracted the building works to the respondent. Due to the respondent's failure to complete the building works, the appellant terminated the subcontract. The respondent then sued the appellant for wrongful termination of the subcontract whilst the appellant counter-claimed for extra costs incurred to complete the building works. The High Court found in favour of the appellant but on appeal, the Court of Appeal reversed the High Court's decision and ordered assessment of damages in favour of the respondent. Upon assessment, the High Court allowed damages as followed: (a) work done — RM2,029,035; (b) variations — RM2,884,288; (c) advance payment — RM500,000; (d) performance bond — RM2,137,500; and (e) loss of profit — RM1,449,074.27. The appellant was dissatisfied with the High Court's assessment and filed the present appeal.

Held, allowing the appeal in part with costs of RM15,000 to be paid by the respondent to the appellant subject to allocator:

(1) The court was satisfied that in the absence of precise joint measurement of the work done, the usage of the interim payment certificate ('IPC') would have been the next best course the court could take. Upon the scrutiny of the documentary evidence, the court observed that the learned High Court judge relied on IPC 14 because it was the IPC most proximate with the time the subcontract was terminated. However, the learned High Court judge overlooked that IPC 14 had been subsequently revised by the issuance of IPC 14R by the consultant architect and

quantity surveyor of the employer. The value of work done based on IPC 14R was RM24,283,700. In the premises, the court found that the learned High Court judge plainly erred in adopting and relying on IPC 14 which should have been IPC 14R instead and this warranted appellate intervention. After considering the previous payment of RM18,552,865 made by the appellant to the respondent as found by the learned High Court judge, the value of outstanding work done was therefore RM783,200 (see paras 25–28).

(2) It was axiomatic in civil litigation that he who asserted must prove his claim — see ss 101 and 102 of the Evidence Act 1950. Consequently, it was the respondent's responsibility to provide sufficient evidence that the rock excavation was indeed completed as a variation to the subcontract agreement. However, after reviewing the oral and documentary evidence, the court found no variation instruction from the employer's architect and there were also no job sheets documenting the actual rock excavation work performed by the respondent as proof of the variation work at the relevant time. Therefore, the respondent's claim for variation was not proven, consequently, there should be no award (see paras 32–34).

(3) At the hearing of the appeal, the appellant re-affirmed that it had conceded to this head of award of RM500,000 on advance payment refund. It was therefore unnecessary for the court to further deal with it (see para 35).

(4) The court noted that the performance bond in issue in the present case was not a guarantee given by a third party such as a banker in most construction contracts. It was actually by way of a prescribed fixed deduction from the payments paid to the appellant by the employer. In the premises, the court agreed with the findings of the learned High Court judge that the performance bond refund must be made in full to the respondent. The replacement performance bond must logically have been provided by the completion contractor and this further justified that the respondent was entitled to a full refund (see para 38).

(5) Just like in the award of variation, the award of loss of profit was subject to strict proof, otherwise, it must fail *in limine*. It was clear to the court that a claim for loss of profit due to the wrongful termination of a construction contract could be proven by direct evidence (both documentary and testamentarily explained), namely: the difference between the contract value of the remaining unfinished work and the expected costs incurred to complete that work. The court found that the respondent failed to provide any convincing reason why such direct evidence could not be presented. The use of a mere estimated percentage of profit on the balance of the unfinished work was unacceptable. Thus, the respondent, in the circumstances, was only entitled to nominal damages in the sum of RM10,000 (see paras 43–46).

[Bahasa Malaysia summary

Perayu telah diawardkan kontrak utama oleh Kementerian Pendidikan Malaysia ('majikan') untuk membina sebuah sekolah di Kuala Marudu, Sabah ('kerja-kerja pembinaan tersebut') dengan nilai kontrak sebanyak RM42,750,000. Perayu kemudiannya telah mensubkontrakkan kerja-kerja pembinaan tersebut kepada responden. Disebabkan kegagalan responden untuk menyiapkan kerja-kerja pembinaan tersebut, perayu telah menamatkan subkontrak tersebut. Responden kemudiannya menyaman perayu atas penamatan subkontrak secara salah manakala perayu telah menuntut balas kos tambahan yang ditanggung untuk menyiapkan kerja-kerja pembinaan tersebut. Mahkamah Tinggi telah memutuskan untuk memihak kepada perayu tetapi atas rayuan, Mahkamah Rayuan telah membatalkan keputusan Mahkamah Tinggi dan memerintahkan taksiran ganti rugi memihak kepada responden. Setelah taksiran dibuat, Mahkamah Tinggi membenarkan ganti rugi seperti berikut: (a) kerja yang telah selesai — RM2,029,035; (b) variasi — RM2,884,288; (c) bayaran pendahuluan — RM500,000; (d) bon pelaksanaan — RM2,137,500; dan (e) kehilangan keuntungan — RM1,449,074.27. Perayu tidak berpuas hati dengan penaksiran Mahkamah Tinggi dan memfailkan rayuan semasa.

Diputuskan, membenarkan sebahagian rayuan dengan kos sebanyak RM15,000 yang perlu dibayar oleh responden kepada perayu tertakluk kepada alokator:

(1) Mahkamah berpuas hati bahawa jika tiada pengukuran bersama yang tepat bagi kerja yang telah selesai, penggunaan sijil pembayaran interim ('IPC') adalah langkah terbaik seterusnya yang boleh diambil oleh mahkamah. Setelah meneliti keterangan dokumentari, mahkamah mendapati bahawa hakim Mahkamah Tinggi yang bijaksana bergantung pada IPC 14 kerana ia merupakan IPC yang paling hampir dengan masa subkontrak tersebut ditamatkan. Walau bagaimanapun, hakim Mahkamah Tinggi yang bijaksana terlepas pandang bahawa IPC 14 telah disemak semula kemudiannya melalui pengeluaran IPC 14R oleh arkitek perunding dan juruukur bahan majikan. Nilai kerja yang dilakukan berdasarkan IPC 14R ialah RM24,283,700. Berdasarkan premis tersebut, mahkamah mendapati bahawa hakim Mahkamah Tinggi yang bijaksana jelas terkhilaf dalam menerima pakai dan bergantung pada IPC 14 sedangkan beliau sepatutnya bergantung pada IPC 14R dan ini memerlukan campur tangan rayuan. Selepas mempertimbangkan pembayaran terdahulu sebanyak RM18,552,865 yang dibuat oleh perayu kepada responden seperti yang didapati oleh hakim Mahkamah Tinggi yang bijaksana, nilai tertunggak bagi kerja yang telah selesai adalah RM783,200 (lihat perenggan 25–28).

(2) Adalah menjadi sesuatu yang aksiomatik dalam litigasi sivil bahawa

seseorang yang menegaskan harus membuktikan tuntutannya — lihat ss 101 dan 102 Akta Keterangan 1950. Oleh itu, adalah menjadi tanggungjawab responden untuk memberikan keterangan yang mencukupi bahawa penggalian batu yang didakwa sememangnya telah disiapkan sebagai variasi kepada perjanjian subkontrak tersebut. Walau bagaimanapun, selepas menyemak keterangan lisan dan dokumentari, mahkamah tidak menemui arahan variasi daripada arkitek majikan dan juga tiada helaian kerja yang mendokumenkan kerja penggalian batu sebenar yang dilakukan oleh responden sebagai bukti kerja variasi pada masa yang berkaitan. Oleh itu, tuntutan responden untuk variasi tidak dibuktikan, maka, award bagi variasi tidak sepatutnya diberikan (lihat perenggan 32–34).

(3) Semasa pendengaran rayuan, perayu mengesahkan semula bahawa ia telah bersetuju dengan award bayaran pendahuluan sebanyak RM500,000 ini. Oleh itu, mahkamah tidak perlu membicarakannya dengan lebih lanjut (lihat perenggan 35).

(4) Mahkamah mendapati bahawa bon pelaksanaan yang dipersoalkan dalam kes semasa bukanlah jaminan yang diberikan oleh pihak ketiga seperti jurubank dalam kebanyakan kontrak pembinaan. Ia sebenarnya melalui potongan tetap yang ditetapkan daripada bayaran yang dibayar kepada perayu oleh majikan. Berdasarkan premis tersebut, mahkamah bersetuju dengan dapatan hakim Mahkamah Tinggi yang bijaksana bahawa bayaran balik bon pelaksanaan harus dibuat sepenuhnya kepada responden. Bon pelaksanaan gantian haruslah secara logiknya telah disediakan oleh kontraktor penyiapan dan ini seterusnya mewajarkan responden berhak mendapat bayaran balik penuh (lihat perenggan 38).

(5) Sama seperti dalam award variasi, award kehilangan keuntungan tertakluk kepada pembuktian yang ketat, jika tidak, ia harus gagal in limine. Jelas kepada mahkamah bahawa tuntutan kehilangan keuntungan disebabkan oleh penamatan kontrak pembinaan yang salah boleh dibuktikan melalui keterangan langsung (baik dokumentari mahupun yang dijelaskan secara lisan), iaitu: perbezaan antara nilai kontrak kerja yang belum selesai dan kos yang dijangkakan yang ditanggung untuk menyiapkan kerja tersebut. Mahkamah mendapati bahawa responden gagal memberikan apa-apa alasan yang meyakinkan mengapa keterangan langsung tersebut tidak dapat dikemukakan. Penggunaan peratusan keuntungan yang dianggarkan sahaja ke atas baki kerja yang belum selesai tidak boleh diterima. Oleh itu, responden, dalam keadaan tersebut, hanya berhak mendapat ganti rugi nominal sebanyak RM10,000 (lihat perenggan 43–46).]

Cases referred to

Kembang Serantau Sdn Bhd v Ybk Usahasama Sdn Bhd [2017] MLJU 2165; [2018] 1 LNS 206, HC (refd)

Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd [1995] 1 MLJ 214; [1995] 3 CLJ 511, HC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (folld)

Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149; [2012] 1 LNS 1416, CA (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 1 CLJ 133, HC (folld)

Richallenge Corp Sdn Bhd v Poteck Enterprise Sdn Bhd [2020] 3 MLJ 704, CA (refd)

Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (folld)

Legislation referred to

Evidence Act 1950 ss 45, 101, 102

Appeal from: Suit No BKI-22NCVC-75–7 of 2015 (High Court, Kota Kinabalu)

Toh Puan Marina Tiu (with Joan Goh Pean Nee) (Goh & Assoc) for the appellant.
Ronnie Cham Ngit Shin (with Chleo Teo) (Ronny Cham & Co) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal on the assessment of damages pursuant to a terminated construction contract.

[2] The appellant, who is the defendant in the High Court, is a private limited company.

[3] The respondent, also a private limited company, is the plaintiff in the High Court.

[4] We heard the appeal on 14 March 2025 and subsequently adjourned the decision to allow time for deliberation on the arguments presented by the parties.

[5] Now having done so, we hereby give our decision below together with our supporting grounds.

A BACKGROUND

[6] The appellant was awarded the main contract by the Ministry of Education of the Federal Government of Malaysia ('employer') to construct a school named Sekolah Menengah Kebangsaan Tandek 2, located in Kuala Marudu, Sabah, with a contract value of RM42,750,000 ('main contract sum').

[7] The appellant thereafter subcontracted the carrying of the whole of the building works to the respondent via a written subcontract agreement dated 28 July 2009 ('subcontract agreement'). The subcontract sum of the respondent is determined at RM35,228,250 ('subcontract sum'), to wit, 85% of RM41,445,000 being the main contract sum less contribution and levy charges of RM1,305,000. Thus, the balance of RM6,216,750 being 15% of the main contract sum less contribution and levy charges is the appellant's entitlement.

[8] During the course of construction of the school, there were disputes that arose that resulted in the appellant on 11 November 2014 terminating the subcontract agreement for the respondent's failure to complete the construction of the school.

[9] Consequently, the respondent commenced the action in the High Court ('Suit') and claimed damages against the appellant for wrongful termination of the subcontract agreement. The appellant counter-claimed damages against the respondent especially the extra costs incurred to complete the building works by Bangkit Energy Pro Logistic (EM) Sdn Bhd ('completion contractor').

G IN THE HIGH COURT

[10] After trial of the suit, the High Court on 15 November 2021, found in favour of the appellant.

H

[11] On appeal by the respondent, this court in Civil Appeal No S-02(NCvC)(W)-2545–12 of 2017, reversed the High Court's decision on 21 March 2019 (see *Richallenge Corp Sdn Bhd v Poteck Enterprise Sdn Bhd* [2020] 3 MLJ 704). The High Court was then ordered to assess the damages I suffered by the respondent due to the appellant's unlawful termination of the subcontract agreement.

[12] Consequently, upon assessment, the High Court on 14 December 2021 allowed damages under the following headings:

No	Damages	Amount (RM)
(i)	Work done	RM2,029,035
(ii)	Variations	RM2,884,288
(iii)	Advance payment	RM500,000
(iv)	Performance bond	RM2,137,500
(v)	Loss of profit	RM1,449,074.27

Thus, the High Court ordered the appellant to pay the total amount of RM8,999,897.27, with interest at the rate of 8%pa from 29 September 2014 to the date of judgment and thereafter statutory interest on the said sum at the rate of 5%pa from the date of judgment to the date of full payment and costs of RM10,000 subject to allocator.

[13] The appellant is dissatisfied with the assessment made by the High Court and, therefore, filed an appeal with the Court of Appeal on 11 January 2022.

FINDINGS OF THIS COURT

[14] Although this is an appeal arising from the assessment of damages, our function here is no different from that of an appeal on liability after trial in the High Court.

[15] It is therefore a review of the High Court decision and we are guided by the case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC) where Zaleha Yusof FCJ held as follows with emphasis added by us:

> [62] The Malaysian position has always been that, a decision that is arrived at, due to a lack of judicial appreciation of evidence is plainly wrong. The Federal case of *Gan Yook Ching (P) & Anor v Lee Ing Chin @ Lee Tuck Seng & Ors* call consideration as to what constitutes as the 'plainly wrong' test.
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> [71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in *Henderson* separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test:
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> (i) *a material error of law*;
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> (ii) *a critical finding of fact which has no basis in the evidence*;
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> (iii) *demonstrable misunderstanding of relevant evidence*; and
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> (iv) *a demonstrable failure to consider relevant evidence*;

(all of which justifies appellate intervention of a trial judge's decision), this court in *Gan Yook Chin* effectively included them under what amount to the trial judge as being 'plainly wrong'.

[72] *The phrase 'lack of judicial appreciation of evidence' used in Gan Yook Chin could very well encompass three out of four errors of a trial judge* (other than the 'material error of law') said to be identifiable by Lord Reed in Henderson, namely:

(i) critical factual finding which has no basis in evidence;

(ii) demonstrable misunderstanding of relevant evidence; and

(iii) demonstrable failure to consider relevant evidence.

[73] *Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of 'material error of law' listed by Lord Reed in Henderson can occur when a trial judge erroneously apply legal principles (eg rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by the trial judge in arriving at his conclusions* (eg, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.

...

[148] Given the aforesaid, *we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.*

See also *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 (CA).

[16] Besides, it is also instructive to refer and rely on the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133 (affirmed and applied in *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611 (CA)) on assessment of damages where Edgar Joseph Jr J (later FCJ) held as follows:

I now turn to consider the crucial question: have the plaintiffs proved their claim for damages as alleged or at all?

With regard to this part of the case, I would preface what I have to say by referring to certain well-established principles.

It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

Thus, nominal damages may be awarded in all cases of breach of contract (see *Marzetti v Williams* [1830] 1 B & Ad 415. And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See, for example, *Dixon v Deveridge* [1825] 2 C & P 109 and *Twyman v Knowles* [1853] 13 CB 222.

On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in Biggin v Permanite [1951] 1 KB 422, 438 *namely, 'where precise evidence is obtainable, the Court naturally expects to have it, where it is not, the Court must do the best it can. Nevertheless, it remains true to say that generally difficulty of proof does not dispense with the necessity of proof' (see Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788, 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] WLR 1731 (CA) in which the plaintiff claiming for diminution of profits of his one-man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also, when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the Court will expect precise evidence to be given. (See para 345 McGregor on Damages, 15th Edn.)

[17] Based on these principles, we will undertake our review on all the five headings awarded by the High Court seriatim.

Work done

[18] It is not disputed that the proof of the value of work done by the respondent is based on the testimony and report produced by its expert witness, PW3 who is a chartered quantity surveyor. Upon our review of PW3's qualifications and work experience, we are satisfied that he is a competent witness as required by s 45 of the Evidence Act 1950.

[19] The appellant however contended that PW3's valuation is unreliable without the supporting evidence of a factual witness on the foundational fact of the actual building works done.

[20] In rebuttal, the respondent counter-contended that the foundational factual evidence of building works done has been made available to the High Court by the appellant through its witnesses DW1, its quantity surveyor who supervised the building works and DW5, the chief executive officer of the completion contractor.

[21] That notwithstanding, the appellant contended before us the valuation should not be based on interim payment certificate No 14 ('IPC 14') jointly issued by the consultant architect and quantity surveyor of the employer that has been relied by PW3.

[22] The respondent however replied that the adoption of IPC 14 relied upon by PW3 and by the High Court is correct and ought to be maintained. In this regard, the learned High Court judge held as follows in the grounds of decision:

> To my knowledge, there was no joint measurement carried out upon termination by PESB, so it would therefore, be reasonable as a minimum, to base the cumulative value of work done carried out by RCSB up to the wrongful termination as valued in IPC#14 being RM25,519,000 to which RCSB are entitled to 85% less the agreed deductions of RM1,305,000 as stated in the subcontract agreement cl 2.1, equivalent to RM20,851,900.
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> ...
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> After taking into consideration the various payments that had been received by the plaintiff in the various IPC she came to the conclusion (sic) that the amount of work done but not paid is therefore RM2,029,035.
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> As stated earlier, the defendant's position is that the plaintiff ought not to be awarded this amount of RM2,029,035 as the plaintiff has been overpaid by the defendant based on the evidence of DW3, DW2A and also DW5.
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> In regard to this issue, I am more inclined to agree with the position taken by the plaintiff that the issue of overpayment has been dealt with by the COA when COA dismissed the defendant's counterclaim. In view of the dismissal, I don't think there is any basis for the defendant's arguments.
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> Based on the reasons above, I find that there is no reason for me to reject the plaintiff's claim for work done in the amount of RM2,029,035.

[23] Upon our review, we noted as alluded by the learned High Court judge that there is no joint measurement and valuation of the work done carried out by the parties after the termination of the subcontract agreement which would have been the ideal and most accurate foundational factual basis to undertake the valuation of work done by the respondent.

[24] In the premises, the learned High Court judge accepted the valuation done by PW3 which has been based on IPC 14 being the relevant interim payment certificate. The value of work done based on IPC 14 is RM25,519,000.

[25] We are satisfied that in the absence of precise joint measurement of the work done, the usage of the interim payment certificate would have been the next best course the court can take following *Popular Industries Limited*

v Eastern Garment Manufacturing Sdn Bhd. We have borne in mind that the parties have throughout the currency of the subcontract agreement also relied on the interim payment certificates jointly issued by the employer's consultant architect and quantity surveyor all along for payment purposes between them.

[26] The pivotal question is then whether it is appropriate to rely on IPC 14. In this respect and upon our scrutiny of the documentary evidence, we observed that the learned High Court judge relied on IPC 14 because it was the interim payment certificate most proximate with the time the SubContract Agreement is terminated. However, the learned High Court judge overlooked that IPC 14 has been subsequently revised by the issuance of IPC 14R by the consultant architect and quantity surveyor of the employer. The value of work done based on IPC 14R is RM24,283,700.

[27] In the premises, we find that the learned High Court judge plainly erred in adopting and relying IPC 14 which should have been IPC 14R instead and this warranted appellate intervention by us.

[28] After considering the previous payment of RM18,552,865 made by the appellant to the respondent as found by the learned High Court judge, the value of outstanding work done is therefore RM783,200 ((RM24,283,700 x 85% - RM1,305,000) - RM18,552,865).

[29] We are mindful that the appellant also contended that the respondent has instead been overpaid by RM9,443,800 because of the substantial payment that the appellant has further paid the completion contractor to complete the building works. However, upon our reading of the pleadings, this is based on the appellant's plea that it is because of the conspiracy between the respondent and the project consultants which has been dismissed by the Court of Appeal in *Richallenge Corp Sdn Bhd v Poteck Enterprise Sdn Bhd*. Thus, and as found by the learned High Court judge, we agree that this contention and counterclaim of overpayment is baseless. Be that as it may, we are unable from the materials available before us discern as to exactly how much of the alleged RM9,443,800 is attributed to work not done by the respondent but by the completion contractor in the absence of joint measurement of the work done upon the termination of the subcontract agreement. The joint measurement exercise ought to have been initiated by the appellant.

Variations

[30] The appellant's contention here is that the respondent has failed to prove that the variation work which involved rock excavation was indeed done by the respondent. In this respect, the appellant merely relied on the valuation

of PW3, its expert witness that was accepted by the learned High Court judge uncritically without the foundational fact of the rock excavation done prior proved.

[31] This is of course refuted by the respondent who relied on the following grounds of decision of the learned High Court judge:

> Based on the testimony of PW3, I am of the opinion that this court should accept the testimony of PW3 as above because PW3 is not only an expert and impartial witness, but his testimony that any excavation works is one of the first thing to be carried out on the construction site remains unchallenged. His evidence that it is the customary practice in the industry with late valuation of variations in my view lends credence to his testimony and it is more probably in the circumstances of the case.

[32] It is axiomatic in civil litigation that he who asserts must prove his claim; see ss 101 and 102 of the Evidence Act 1950.

[33] Consequently, it is the respondent's responsibility to provide sufficient evidence that the rock excavation was indeed completed as a variation to the subcontract agreement. However, after reviewing the oral and documentary evidence, we find no variation instruction from the employer's architect, nor do we find job sheets documenting the actual rock excavation work performed by the respondent as proof of the variation work at the relevant time. In our view, the following testimony of PW 3, who is not a factual witness but was primarily relied upon by the learned High Court judge, is insufficient:

> Well. Any excavation work is the first thing that is done on site. So, before construction can begin, the excavation has to be completed. So, I deduced that the rock excavation must have been carried out by the Plaintiff before the works were taken over by others at much later date.

[34] As the result, we find that the learned High Court judge plainly erred in law as well as in not having judicially appreciated the evidence here which again warrants appellate intervention. Since this head of claim has not been proved, we find and hold that there should be no award.

Advance payment

[35] At the hearing of the appeal, the appellant re-affirmed that it has conceded to this head of award of RM500,000 on advance payment refund. It is therefore unnecessary for us to further deal with it.

Performance bond

[36] Again, at the hearing of the appeal, the appellant has conceded on the performance bond refund except that it ought to be 85% of RM2,137,500

because of the understanding as set out in the subcontract agreement pertaining to the 85%-15% payment sharing.

[37] However, the respondent replied that the performance bond refund must be made in full by reason of the termination of the subcontract agreement wherein the respondent is no longer responsible for the completion of the building works. In this regard, the respondent relied on the following ground of decision of the learned High Court judge:

> In regard to this issue, since there was no evidence to show that there was any claim made on the performance bond, and there is no clear evidence to show that the performance bond deductions are related to the 15%-85% distribution specified in the subcontract agreement, I am more inclined to agree with the position taken by the plaintiff. In the circumstances, I allow the plaintiffs claim for the refund of the performance bond.

[38] We noted that the performance bond in issue here is not a guarantee given by a third party such as a banker in most construction contracts. It is actually by way of a prescribed fixed deduction from the payments paid to the appellant by the employer. In the premises, we agree with the findings of the learned High Court judge that the performance bond refund must be made in full to the respondent. The replacement performance bond must logically have been provided by the completion contractor and this, in our view, further justifies that the respondent is entitled to a full refund.

[39] There is thus no error here by the learned High Court judge that warrants appellate intervention.

Loss of profit

[40] The appellant contended that the respondent failed to prove with substantiating direct evidence that it is entitled to a loss of profit of RM1,499,074.27 on the balance unperformed building works due to the termination of the subcontract agreement. In this respect, the respondent merely relied on the opinion of PW3, its expert witness that a 5% profit is expected to be generated on the balance of the remaining building works.

[41] In response, the respondent relied again on the following finding of the learned High Court judge in the grounds of decision:

> In respect of this claim, it is my finding that PW3's testimony is probable in the circumstances, he had in his testimony clearly stated that the 5% is based on the normal profit in the industry. As he is an expert in the industry and there is no other evidence that was adduced to show that figure claimed is excessive or out of the ordinary, I am inclined to accept his testimony on this.

[42] Just like in the award of variation, we are of the view that the award of loss of profit is subject to strict proof; see *Kembang Serantau Sdn Bhd v YBK Usahasama Sdn Bhd* [2017] MLJU 2165; [2018] 1 LNS 206. Otherwise, it must fail *in limine.*

[43] It is clear to us that a claim for loss of profit due to the wrongful termination of a construction contract can be proven by direct evidence (both documentary and testamentarily explained), namely: the difference between the contract value of the remaining unfinished work and the expected costs incurred to complete that work. We find that the respondent failed to provide any convincing reason why such direct evidence could not be presented. The use of a mere estimated percentage of profit on the balance of the unfinished work is unacceptable, as similarly noted in *Kembang Serantau Sdn Bhd v YBK Usahasama Sdn Bhd*.

[44] Thus the respondent, in the circumstances, is only entitled to nominal damages following *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214; [1995] 3 CLJ 511 (FC).

[45] The learned High Court judge hence plainly erred here and that justifies appellate intervention.

[46] Consequently, we find that the respondent ought fairly to be awarded nominal damages of RM10,000 for the loss of profit claim.

CONCLUSION

[47] For the foregoing reasons, we hereby unanimously allow the appeal in part. Thus, in respect of work done, the award is substituted to RM783,200 only. As for variations, the award is substituted to nil. Finally, with regard to the loss of profit, the award is substituted to RM10,000 only. The High Court order shall be so varied accordingly and reads: The plaintiff be entitled to damages assessed in the sum of RM3,430,700 together with interest at the rate of 8%pa from 29 September 2014 to the date of judgment, and statutory interest on the said sum at the rate of 5%pa from the date of judgment to the date of full payment and cost of RM10,000 against the defendant subject to the payment of allocator.

[48] We further order costs of RM15,000 to be paid by the respondent to the appellant subject to allocator.

Appeal allowed in part with costs of RM15,000 to be paid by respondent to appellant subject to allocator.

Reported by Dzulqarnain Ab Fatar